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IN THE

Supreme Court of the United States

October Term, 1966

No. 830

GRACE LINE, a corporation and SS "SANTA JUANA,"
Petitioners,

v.

MICHAEL J. KANTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PAGE

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	2
Conclusion	9
Appendices:	
Appendix A	A-1
Appendix B	A-4

TABLE OF CASES

Akers v. States Marine Lines, 344 F.2d 217 (5 CCA 1965)	8
Amell v. United States, 384 U.S. 158 (1966)	7
Bennett v. The Moremacdale, 160 F.Supp. 840, aff'd 254 F.2d 138 (1958) (2 CCA), cert. den. 358 U.S. 815	3
Biggs v. Norfolk Dredging Company, 360 F.2d 360 (3 CCA 1966)	9
Course v. Pacific Island, 234 F. Supp. 675 (D.C. Ore. 1964)	9
Denko v. United States, 350 F.2d 698, (3 CCA 1965), cert. granted 383 U.S. 966	8
Hertel v. American Export Lines, 225 F.Supp. 703 (S.D. N.Y. 1964)	9
Italia SOC v. Oregon Stevedoring Co., 376 U.S. 315 (1963)	6
Jackson v. Lykes Bros., 185 So.2d 1342 (La. 1966)	9
Johansen v. United States, 343 U.S. 427 (1952)	7

Page

Miculka v. American Mail Lines, 229 F.Supp. 665 (D.C. Ore. 1964) 8

Nogueira v. N.Y.N.H. and H.R. Co., 21 U.S. 128 3

Norton v. Warner Company, 321 U.S. 565 (1943) 3

Reed v. SS "YAKA," 373 U.S. 410 ..... 2, 4, 5, 6 et seq.

Robinson v. Lykes Bros., 170 So.2d 243 (La. 1964) 9

Ryan Stevedore Co. v. Pan-Atlantic Corp., 350 U.S. 124 (1955) 3

Ryan v. Pan-Atlantic Corp., 350 U.S. 124 (1955) 3, 7

Petterson v. United States, 350 U.S. 495 (1959) 7

Samuels v. Munson Steamship Line, 63 F.2d 861 (1933), 5 CCA 3

Smith v. The Moremacdale, 198 F.2d 849, 3 CCA (1952), cert. den. 345 U.S. 908 4

South Chicago Co. v. Bassett, 309 U.S. 251 (1939) 3

Swanson v. Marrah Bros., 328 U.S. 1 (1945) 3

White v. United States Lines Company, 254 F.Supp. 480 (D.C. Md. 1966) 8

STATUTES

28 U.S.C. Sec. 1254(1) 1

33 U.S.C. Sec. 905 2

Sec. 907 2

Sec. 933 2

OTHER AUTHORITIES

U.S. Congressional & Administrative News, 1959, Vol. 2, p. 2134 3

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MICHAEL J. KANTON,	*Respondent.*	

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 8, 1966.

CITATION TO OPINION BELOW

The memorandum opinion of the Ninth Circuit, decided September 8, 1966, is unreported and is reproduced in Appendix B. The opinion of the District Court was not printed.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 8, 1966, Appendix B. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1 (a). Can a shipowner-employer of a longshore employee be sued directly for personal injuries in view of

33 U.S.C. Sec. 905 of the Longshoremen's and Harbor Workers' Compensation Act?

1 (b). Is such a result compelled by the case of *Reed v. SS "YAKA,"* 373 U.S. 410 where, as in the instant case, there is no third party and the shipowner-employee is sued directly?

STATUTES INVOLVED

The statutory provisions involved are 33 U.S.C. Secs. 905, 907 and 933.

STATEMENT OF THE CASE

Respondent Michael J. Kanton filed a libel *in rem* for damages for personal injuries sustained on navigable waters of the United States at Tacoma, Washington on November 26, 1961, while employed on the SS "SANTA JUANA." The SS "SANTA JUANA" is a wholly owned and operated vessel belonging to Kanton's employer, Grace Line. Jurisdiction in the District Court was based upon an alleged maritime tort occurring in navigable waters of the United States.

After receiving the statutory compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, respondent instituted this action.

REASONS FOR GRANTING THE WRIT

1. *The decisions of the court below in the instant case (see Appendix B) completely disregarded the provisions of* 33 *U.S.C., Sec.* 905.

The Longshoremen's and Harbor Workers' Compensation Act will hereinafter be referred to as the Act and 33 U.S.C. Sec. 905 will hereinafter be referred to as Sec. 5.

The constitutional basis for sustaining the Act was the counter-balancing of *"quid pro quo"* doctrine of immunization of the employer from all suits by his employees in return for the employer's providing assured statutory compensation under the Act to all injured employees, regardless of fault. This was recognized as late as the case of *Ryan v. Pan-Atlantic Corp.*, 350 U.S. 124 (1955) and by Congress when considering amendments to Sec. 33 of the Act in 1959. See Senate Report No. 428 (U.S. Congressional & Administrative News, 1959, Vol. 2, p. 2134).

This court has always recognized the stevedore employer's complete immunity from suit by his employees in the following cases:

South Chicago Co. v. Bassett, 309 U.S. 251 (1939); *Nogueira v. N.Y.N.H. and H.R. Co.*, 21 U.S. 128 (1929); *Norton v. Warner Company*, 321 U.S. 565 (1943); *Swanson v. Marrah Bros.*, 328 U.S. 1 (1945); *Ryan Stevedore Co. v. Pan-Atlantic Corp.*, 350 U.S. 124 (1955).

The maintenance of this action contravenes the specific statutory language of Sec. 5 and violates the "counter-balancing" considerations justifying compensation legislation and was clearly erronous.

2. *Efforts by a longshoreman to avoid the plain statutory immunization of the employer from direct suit by instituting an action in rem where the employer is also the shipowner (as in the instant case) have been uniformly struck down.*

Samuels v. Munson Steamship Line, 63 F.2d 861 (1933) 5 CCA; *Bennett v. The Moremacdale*, (1958) 160 F. Supp. 840, affirmed 254 F.2d 138 (2 CCA), cert.

denied, 358 U.S. 815; *Smith v. The Moremacdale*, 198 F.2d 849, 3 CCA (1952) cert. denied, 345 U.S. 908.

None of these decisions have been overruled by this court either before or after the case of *Reed v. SS "YAKA," supra*, and compel the same holding, namely, that a shipowner-employer who employs a longshoreman may not be sued *in rem* for damages by such employee.

3. *Because of totally different factual and legal considerations in Reed v. SS "YAKA," supra, the lower court erred in applying the doctrine of that case to the case at bar.*

In *Reed v. SS "YAKA," supra*, the vessel was owned by Waterman Steamship Company and bare boat chartered to Pan-Atlantic Steamship Company. The charter contained an indemnity provision running to Waterman. The bare boat charteror, Pan-Atlantic Steamship Company, employed Reed, a longshoreman, who was injured because of negligent placement of dunnage by Pan-Atlantic stevedores. Reed filed a libel *in rem* for unseaworthiness of the SS "YAKA." Waterman appeared as owner and claimant and, pursuant to the charter party, impleaded Pan-Atlantic for indemnity.

Both the District Judge and the Third Circuit recognized that such an action could not be maintained if the employer-shipowner were the same individual, as in the instant case.

The Third Circuit held that the case of *Smith v. The Moremacdale, supra*, and the absence of any lien creating obligation prevented maintenance of Reed's action.

Pan-Atlantic Steamship Company, the impleaded

third party for indemnity, claimed the benefits of Sec. 5 of the Act.

This court held under the unique facts of the case that Reed could maintain a direct action for unseaworthiness against his employer, Pan-Atlantic, although he had not done so. The Third Circuit was reversed. The net result of the holding was that Reed recovered damages against Waterman. Pan-Atlantic recovered its stevedore lien for compensation by subrogation but was, in turn under the indemnity agreement, obliged to make Waterman whole.

This is in the traditional pattern of third party stevedore actions. There was no violation of the economic standards of the Act in this holding nor was any undue financial burden placed upon the stevedore-employer (Pan-Atlantic) contrary to the provisions of the Act.

It is entirely another matter to interpret *Reed v. SS "YAKA," supra,* as placing an additional financial burden upon the employer-shipowner by making him directly liable to the employee for damages, where previously he had no indirect liability because of the absence of a third party shipowner to whom the employer would ultimately be responsible.

The crucial distinction between *Reed v. SS "YAKA"* and the case at bar is that no third party is involved as in *Reed v. SS "YAKA," supra,* and here the shipowner-employer is directly sued for damages in violation of the provisions of the Act, whereas in *Reed v. SS "YAKA,"* the shipowner-employer was not directly sued.

The restrictive scope of the holding of *Reed v. SS*

"YAKA," *supra*, is indicated in a footnote in the case of *Italia SOC v. Oregon Stevedoring Co.*, 376 U.S. 315 (1963).

Mr. Justice Black, the author of the majority opinion in *Reed v. SS "YAKA," supra* (at page 325, footnote 2), stated:

> *"Reed v. The YAKA*, 373 U.S. 410, held only that a longshoreman could bring a suit for unseaworthiness against the stevedoring company *which chartered a ship and was the longshoreman's employer."* (Italics ours.)

Reed v. The YAKA, supra, recognized that it would be highly improper to permit the economic burdens of the Act to fall upon an employer contrary to the provisions of the Act. Such a result obtains under the Circuit Court holding permitting maintenance of this action.

4. Under the lower court holding permitting a shipowner-employer to be directly sued by his employee, the shipowner-employer would be deprived of the following statutory benefits under the Act accorded an employer where a third party situation exists; 1. statutory lien for medical expenses provided by 33 U.S.C. Sec. 907(g) (Appendix A); 2. assignment of employee's cause of action provided by 33 U.S.C. Sec. 933(b) (Appendix A); 3. retention of portion of the proceeds of any employer recovery, provided by 33 U.S.C. Sec. 933(D)(e)(1); 4. (Appendix A) lien for compensation paid under any settlement in employer's suit provided by 33 U.S.C. Sec. 933(e)(1)(c) (Appendix A); 5. Right to obtain portion of employer's recovery, 33 U.S.C. Sec. 933(e)(D)(2) (Appendix A); 6. right to be relieved of deficiency claim for compensation in event longshoreman institutes

third party action settled without employer's consent, 33 U.S.C. Sec. 933(g) (Appendix A).

The deprivation of the above-cited economic advantages to an employer, such as petitioners, who are directly sued by a longshore employee, basically violates the shipowner-employer's rights under the Act and thrusts the economic burden of the longshoreman's recovery upon petitioners contrary to the purposes of the Act, and are specifically forbidden by the cases of *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., supra,* and *Reed v. SS "YAKA," supra.*

5. The basic questions presented here, namely, whether a Federal statutory scheme of workman's compensation provides an exclusive remedy for all injured persons eligible for benefits affect not only the private maritime industry of this country but also the United States Government.

The United States Government, in the operation of its constantly growing merchant marine, has protected its employees for injuries under a Congressional Act known as the Federal Employees' Compensation Act. Court decisions have established that maritime employees of the United States are strictly limited to the benefits specified in the Federal Employees' Compensation Act. See *Amell v. United States,* 384 U.S. 158 (1966); *Johansen v. United States,* 343 U.S. 427 (1952); *Petterson v. United States,* 350 U.S. 495 (1959).

The construction placed on the case of *Reed v. SS "YAKA," supra,* by the Ninth Circuit would overrule these cases, *sub silentio* and render the Government liable to suit directly by its maritime employees for unseaworthi-

ness, in violation of Congressional legislation.

There is pending before this court in *Denko v. United States*, 350 F.2d 698, 3 CCA (1965) cert. granted 383 U.S. 966, and argued November 8, 1966, the same basic question as to the exclusiveness of a Federal compensation act to Federal prison inmates.

Petitioners respectfully submit that certiorari should be granted because of the importance of the question of law involved. Affected are claims by private employees, both under the Longshoremen's Act and under the several state workmen's compensation laws as well as by Government employees under the Federal Employees' Compensation Act. In addition, several district court decisions have passed on the precise question here involved and appeals are pending in the Court of Appeals for the Second Circuit in *Peros v. Grace Line Inc.* and *Scopaz v. Grace Line Inc.* (Consolidated appeals, *sub nom Scopaz* and *Peros v. SS "SANTA LUISA"* and *Grace Line Inc.* Docket No. 30851).

It is evident that the issue will recur in numerous cases inasmuch as *Reed v. SS "YAKA," supra,* has precipitated an avalanche of claims for damages against employers, including pre-*Reed v. SS "YAKA," supra,* accidents. See *Akers v. States Marine Lines,* 344 F.2d 217 (5 CCA 1965) and *Miculka v. American Mail Lines,* 229 F. Supp. 665 (D.C. Ore. 1964), giving *Reed v. SS "YAKA," supra,* retroactive effect; also *White v. United States Lines Company,* 254 F. Supp. 480 (D.C. Md. 1966) explaining under what limited circumstances claims on accidents occurring before the decision of *Reed v. SS "YAKA," supra,* will be considered time-barred because of prejudice

to the employer. Some cases have restricted suits based on *Reed v. SS "YAKA," supra,* to *in rem* proceedings against the vessel (*Robinson v. Lykes Bros.*, 170 So.2d 243 (La. 1964)); *Jackson v. Lykes Bros.*, 185 So.2d 1342 (La. 1966) certiorari applied for.

The same influx of claims against the United States under the Federal Employees Compensation Act and against private employers under state compensation laws may be anticipated. These claims go beyond injuries caused by unseaworthiness, for there are decisions reading *Reed v. SS "YAKA," supra,* as authorizing suits under the Jones Act based on fellow-servant negligence: *Biggs v. Norfolk Dredging Company,* 360 F.2d 360 (3 CCA 1966); Contra *Hertel v. American Export Lines,* 225 F. Supp. 703 (S.D. N.Y. 1964); *Course v. Pacific Island,* 234 F. Supp. 675 (D.C. Ore. 1964); as well as authorizing recovery by longshoremen of maintenance and cure (*Biggs v. Norfolk Dredging Company, supra*), a right reserved strictly to members of the crew of a vessel.

Thus, clarification of the *Reed v. SS "YAKA," supra,* holding is urgently required in order that it will not conflict with the basic principles of workmen's compensation legislation and thrust unauthorized financial burdens on employers, contrary to Congressional intent.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

"EXCLUSIVENESS OF LIABILITY. Sec. 905. The liability of an employer prescribed in Sec. 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law, or in admiralty for damages on account of such injury or death."

33 U.S.C. Section 907(g):

"The liability of an employer for medical treatment as herein provided shall not be affected by the fact that his employee was injured through the fault or negligence of a third party not in the same employ, or suit has been brought against such third party. The employer shall, however, have a cause of action against such third party to recover any amounts paid by him for such medical treatment in like manner as provided in Section 933(b) of this Act."

33 U.S.C. Section 933

"33 U.S.C. Sec. 933(a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

"(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to com-

pensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

"(c) The payment in Section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as representative) to recover damages against such third person.

"(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

"(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

"(1) The employer shall retain an amount equal to—

"(A) The expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

"(B) the cost of all benefits actually furnished by him to the employee under Section 7;

"(C) all amounts paid as compensation;

"(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under Section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

"(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

"(f) If the person entitled to compensation institutes proceedings within the period prescribed in Section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

"(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (f) only if such compromise is made with his written approval.

"(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

"(i) The right to compensation or benefits under this Act shall be the exclusive remedy of an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ:

"*Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer."

APPENDIX B

Unreported Decisions of Circuit Court of Appeals for Ninth Circuit, Dated September 8, 1966, Unreported

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GRACE LINE, INC., a corporation, and "S.S. SANTA JUANA,"	*Appellant,*	No. 20,636
v.		
MICHAEL J. KANTON,	*Appellee.*	

(September 8, 1966)

On Appeal from the United States District Court for the Western District of Washington, Northern Division

Before: BARNES, HAMLEY and JERTBERG, Circuit Judges PER CURIAM:

The Supreme Court of the United States in *Reed v. The YAKA*, 373 U.S. 410 (1963), found in effect that the bareboat charter made the stevedore employer the owner of the boat for the duration of the bareboat charter. It held the stevedore employee could maintain a libel *in rem* against the vessel for injuries resulting from the unseaworthiness of the vessel, and that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Secs. 901-950, did not provide an exclusive remedy.

We find the facts of this case undistinguishable.

The District Court made the following Finding of Fact No. 20:

"That the sum of $4,822.05 was paid to libelant in compensation. That $1,490.10 in reason-

able medical costs were paid to furnish necessary care and treatment o flibelant's injuries. That respondent and claimant are entitled to offset the sum of $4,822.05 paid in compensation. That if libelant had incurred said medical costs directly, he would be entitled to an award in that amount. That respondent and claimant are not entitled to an offset of said medical costs."

We concur, and affirm on this issue.

Affirmed.

Miscellaneous

U.S. Congressional & Administrative News, Vol. 2, page 2134. (1959) Senate Report No. 428:

"Like other workmen's compensation laws the Longshoremen's and Harbor Workers' Compensation Act involves a relinquishment of certain legal rights by employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault, their liability to an injured workman is limited under the Act. In some instances, injury to an employee is caused by a third party. In such circumstances Sec. 33 of the Act preserves to the employee the right to seek damages against a third party."